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Supreme Court of the United States

OCTOBER TERM, 1949

No. 302, Misc.

MRS. WINNIE DELONG CLARK,
Petitioner

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinion of the Court Below	1
Jurisdiction of this Court	1
Statement of Case	1
Question Presented	6
Argument	6

TABLE OF CASES

	Page
Brittenham v. Sovereign Camp, Woodmen of The World 167 S. W. 587	7
Court of Honor v. Hutchens, 79 N. E. 409	8
Darden v. North American Benefit Ass'n, 197 S. E. 413	10
Huntingdon v. Fraternal Reserve Ass'n of Oshkosh, (Headnotes 3 and 4), 181 N. W. 819	10
McGovern v. Brotherhood, etc., 98 N. E. 1128	8
Olson v. Grand Lodge A. O. U. W., 184 N. W. 7	10
Order of United Commercial Travelers of America v. Knorr, 112 Fed. (2d) 679	9
Order of United Commercial Travelers of America v. Wolfe, 331 U. S. 586, 610; 67 S. Ct. 1355, 1366	6
Railway Mail Association v. Weir, 156 N. E. 921	8
Southern Travelers' Association v. Boyd, 12 S. W. (2d) 183	7
Southern Travelers' Association v. Cole, 45 S. W. (2d) 675	8
Sovereign Camp, Woodmen of The World v. Arthur, 222 S. W. 729	7
Sovereign Camp, Woodmen of The World v. Jackson, 264 S. W. 289	10
Sovereign Camp, Woodmen of The World v. Peaugh, 234 S. W. 161	10
Supreme Tent, etc. Macabees v. Raedel, 84 N. E. 1133, 1134	8
Tisch v. Protected Home Circle, 74 N. E. 188	6, 8

OTHER CITATIONS

A. L. R., Vol. 171, Law Note p. 7	6
Appleman's Insurance Law and Practice, Vol. 18, p. 206	7
C. J. S., Vol. 46, Sec. 1546b	7

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OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in 177 Fed. 2d. 467.

JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this Court under Section 1254 (1) of Title 28, United States Code. As the validity of no statute of the United States or of any State has been questioned, presumably petitioner is claiming the decision complained of is in conflict with decisions of this Court.

STATEMENT OF CASE.

On October 11, 1939, petitioner's husband, Melvin John Clark, made application for membership in and insurance with The Order of United Commercial Travelers of America, a fraternal benefit society incorporated under the laws of

the State of Ohio, giving his occupation as that of Deputy Sheriff, Hall County, Georgia, residing in Gainesville, Georgia.

The question at once arose as to the classification of the risk of his employment and he was asked the question in a rider attached to his application: "Do you personally ride a motorcycle while performing the regular duties of your occupation?" Clark answered this question "No."

In his application for membership and insurance Clark agreed as follows:

> "I understand that the Order is a fraternal beneficiary society and agree to accept the Certificates of Membership and Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules, and regulations of said Order as they now exist or as they may hereafter be added to, revised or amended, and agree on behalf of myself and my beneficiaries that benefits to be paid shall be those only which may be provided for in the Constitution and By-Laws of the Order in force and effect at the time the accident occurs."

In a rider attached to the application, dated November 9, 1939, Clark made the additional agreement:

> "IN CONSIDERATION of the issuance to me of a certificate of membership and insurance and by reason of my present occupation and duties thereof, it is agreed that the maximum benefits to be payable in the event of disability or death shall be but 75% of the maximum benefits as provided by the Constitution and By-Laws in effect at the time of accident.
>
> "Melvin J. Clark
> "Signature of Applicant
>
> WITNESS:
>
> G. B. Jordan
>
> "In the event of change of occupation, immediately notify the Supreme Office, Columbus, Ohio."

Pursuant to such application and agreements a "Class A" insurance certificate was issued to Melvin John Clark by The Order of United Commercial Travelers of America at Columbus, Ohio, on November 13, 1939. (Note: This certificate carries the endorsement: "See Occupational Rider Attached.")

In July, 1942, the Supreme Council of the respondent at Columbus, Ohio, was notified that Clark had changed his occupation from that of a Deputy Sheriff, not riding a motorcycle, to that of a Gate Keeper; and on July 30, 1942, Clark was advised that as a Gate Keeper he would have a 75% occupational rating.

In April, 1944, Clark entered the employ of the Treasury Department of the United States of America as an investigator for the Alcoholic Tax Unit, but neither Clark nor petitioner nor anyone else acting for either of them ever gave notice to the Supreme Council of appellee in Columbus, Ohio, of the change in occupation of Clark from Gate Keeper to Investigator, Alcoholic Tax Unit, United States Treasury Department; and Clark remained an Investigator in the Alcoholic Tax Unit until June 17, 1947, when he was killed near Homer in Banks County, Georgia, while raiding an illicit distillery as an officer of the United States Alcoholic Tax Unit, he having been shot and killed by the operator of such distillery.

In the contract of insurance sued on it is provided:

> "This certificate, any riders or endorsements, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, a copy of which is attached hereto and made a part hereof, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured

Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects."

Under the heading "Change of Occupation" on Pages 95 and 96 of respondent's Constitution and By-Laws in effect September 1, 1946, and beginning at line 12 on Page 96 provision is made as follows:

> "Classification of risks in case of change of occupation shall be in accordance with the classification of risks specified in the Conference Manual published by The Health and Accident Underwriters, revised to May 1, 1925, which, by reference, is hereby made a part of this Constitution and By-Laws, and the amount of benefits paid shall be only such as are therein specified, . . ."

We have not been served with copy of the record, but presumably the Constitution and By-Laws of respondent and Conference Manual therein referred to are of file in this Court in their original form; and we refer specifically to Pages 95 and 96 of the Constitution and By-Laws effective September 1, 1946, and to Pages 32, 47 and 57 of the Conference Manual of The Health and Accident Underwriters, Edition of 1925, where the following classifications and ratings are made:

Page 32

"County Employees—

"Deputy Sheriff ..... E
"Deputy Sheriff, not riding motorcycle C

Page 47

"Gate Keeper, plant or factory C

Page 57

"Internal Revenue—

"Collector, suppressing illicit distilling .... X"

With these classifications of risks and ratings in mind, we refer to Page 96 of the Constitution and By-Laws of

respondent which specifies the benefits under the ratings shown in the Conference Manual as follows:

> "Rating AA, A and B paying the maximum benefits provided in this Article; rating C paying 75% of the maximum benefits provided in this Article; rating D paying 50% of the maximum benefits provided in this Article; and rating E, F, G, H, I, J, X, XX and XXX paying 25% of the maximum benefits provided in this Article."

In the "Stipulation of Facts" it is agreed that the death of Clark resulted from his occupation as an Investigator for the Alcoholic Tax Unit in suppressing illicit distilling; and when the proofs of death were received, respondent Supreme Council, giving petitioner the most favorable consideration, accepted and approved petitioner's claim under a Class "X" rating and mailed her check for $1250.00 representing 25% of the maximum benefits provided in Article XV, Sec. 18, of the Constitution of respondent. Petitioner accepted and retained the check but declined to cash the same, and such check is now a part of the record in the case, appellant insisting that her husband was entitled to a "C" rating and not to an "X" rating.

Thereafter petitioner sued respondent for $3750.00 (R-2-4) and respondent answered admitting liability for $1250.00 only.

The case was submitted to District Judge Russell under "Stipulation of Facts", certain documentary evidence which has been transmitted to this Court in original form, and oral testimony to which we will make no reference. After hearing arguments of counsel and considering the case, District Judge Russell filed a written opinion in which he made findings of fact and stated his conclusions of law. Judgment was entered pursuant to such opinion that the amount tendered petitioner is all she is entitled to recover. (R-48.) From such judgment an appeal was entered to the Circuit Court of Appeals, Fifth Circuit, and the judgment of the lower court was affirmed.

QUESTION PRESENTED.

Did the Circuit Court correctly interpret and apply the decision in

> *Order of United Commercial Travelers of America* vs. *Wolfe*, 331 *U. S.* 586,

to the undisputed facts in this case?

ARGUMENT.

For a comprehensive analysis of the organization of respondent, the applicable provisions of the Ohio law under which respondent was incorporated and does business, and the limitations which respondent, under its Constitution and the Laws of Ohio, may impose on its members we cite

> *Order of United Commercial Travelers of America* vs. *Wolfe*, 331 U. S. 586, 610; 67 S. Ct. 1355, 1366.

That decision explains and gives the reasons why the rights and obligations of petitioner and respondent under the certificate, Constitution and By-Laws sued on are governed solely and entirely by the law of Ohio. Such decision is also authority for the holding that the Constitution and By-Laws of the Order are binding on the members and beneficiaries and that no subordinate body, officers or members may waive any of the provisions of the laws and Constitution of the Order. *Notes* 9 *and* 10 *to* 333 *U. S.* 591, 592; 67 *S. Ct.* 1355, 1357 *and* 1358. Such decision also holds that any changes duly made in the Constitution and By-Laws after the certificate is issued "shall bind said Order and said insured and shall govern and control the contract in all respects." See

> *Tisch* vs. *Protected Home Circle*, 74 N. E. 188, and and *Law Note in* 171 *A. L. R.* 7.

If when Clark gave up his job as Gate Keeper and entered the employment of the U. S. Government as an Investigator in the Alcoholic Tax Unit, he had notified respondent of the

change in his occupation, respondent could have cancelled his insurance certificate.

Sovereign Camp, Woodmen of The World vs. *Arthur*, 222 S. W. 729; and

Brittenham vs. *Sovereign Camp, Woodmen of The World*, 167 S. W. 587.

See Article XV, Sec. 18 of respondent's Constitution and By-Laws effective September 1, 1946, beginning at Line 30 and going through Line 37 on Page 95. Respondent voluntarily treated the claim of petitioner as if her husband had notified respondent of the change in his occupation and paid to her the full amount which she would have been entitled to receive if Clark had notified respondent of such change and respondent had not cancelled his certificate but had given him an "X" rating.

In 46 *C. J. S., Section* 1546 *b*, it is provided:

> "The amount of benefits may be limited with reference to the occupation of the member at the time of his injury or death, . . . The amount of benefits may be limited with reference to the occupation in which the member is engaged at the time of his injury or death, . ."

The following statement appears at Page 206 of *Volume* 18 *of Appleman's Insurance Law and Practice:*

> "... an insured is chargeable with notice of a by-law, made a part of the contract, reducing the insurance if engaged in a more hazardous occupation under a classification in a named manual."

In

Southern Travelers' Association vs. *Boyd*, 12 S. W. (2d) 183,

substantially the same questions were presented as in this case and the Court there held that where the insured had changed his occupation after his certificate was issued to him, his beneficiary was entitled to recover the reduced bene-

fits which were in accordance with the occupational classifications set up in the Health and Benefits Underwriters Manual. While the ruling of the Boyd case was subsequently questioned in

Southern Travelers' Association vs. *Cole,* 45 S. W. (2d) 675,

the sole reason for such questioning was the existence of a Texas Statute construed to require that all the contingencies insured against and all exceptions, had to be specified in the certificate itself. As we have hitherto pointed out, the Ohio Statutes (see the footnotes to the decision in the Wolfe case, supra) specifically provide otherwise.

If under Ohio law a valid limitation of liability may be effected by a subsequent change in the Constitution, then clearly a valid limitation of liability may be effected by the Constitution as it exists at the time the contract is entered into. To put our contention a little differently: since the Courts of Ohio have gone a great deal further than is required to uphold respondent's contentions, such decisions by the Ohio Courts necessarily embrace appellee's contentions and are controlling.

Tisch vs. *Protected Home Circle,* 74 N. E. 188;

Supreme Tent, etc. Macabees vs. *Raedel,* 84 N. E. 1133, 1134;

McGovern vs. *Brotherhood, etc.,* 98 N. E. 1128;

Railway Mail Association vs. *Weir* 156 N. E. 921;

Court of Honor vs. *Hutchens,* 79 N. E. 409.

In each of these cases the amendment to the Constitution which was upheld by the Court was necessarily "repugnant" to the certificate, if petitioner's theory of repugnancy were adopted.

The truth is that under such a contract as we have here, both the contract and the Ohio law make the Constitution

controlling; not just the Constitution as it exists when the contract is entered into, but the Constitution as it exists when the accident occurs. We do not have to go that far here but such is the effect of the Ohio Statutes and cases, and such is the effect of the Wolfe case, supra.

In

Order of United Commercial Travelers of America vs. *Knorr*, 112 Fed. (2d) 679,

Article XV, Section 17, having reference to "Change of Occupation" of the insured member was before the Court. The facts in the Knorr case were these: after a Class A certificate was issued to him, Knorr lost the sight of his left eye as the result of disease and after he had lost the vision in his left eye, he was killed as the result of an accident. The District Court charged the jury as follows:

> "If you find that George W. Knorr, Jr., had lost the sight of an eye as I have stated, but if you further find from all of the evidence in the case that—if you do not further find from all of the evidence in the case that there was a causal connection between the manner in which he met his death and the condition of his left eye, that is, if he could not see out of that eye, but that had nothing to do with the manner in which he met his death, then I instruct you that whether George Knorr had lost the sight of his eye is immaterial in determining the amount which the plaintiffs should recover in this case."

The jury returned a verdict for the plaintiff for $5,000.00. When holding that the decision of the trial Court was reversed because of this charge, the Court made the following ruling:

> "Whether the loss of the eye contributed to the accident resulting in death was not the question under consideration. The matter to be determined was the coverage of the policy. The effect of this certificate, fairly construed, is that where a member has both eyes the company will issue an 'A' certificate of insurance,

agreeing to pay his beneficiary $5,000 if death results from accidental causes, but that if he has but one eye the maximum of indemnity he may have is $2,500; that where a member has an 'A' certificate and thereafter loses an eye he must notify the company, whereupon his 'A' certificate will be canceled and he may then have a 'B' certificate. If he does not notify the company of such loss, the certificate remains in force for only $2,500, the same as though it had been canceled and a 'B' certificate had been issued.

"If the insured suffered the permanent loss of the sight of an eye and thereafter lost his life through accidental means, recovery under the terms of the policy was limited to $2,500.

"The challenged instruction did not properly present this issue to the jury for its determination."

Other decisions which are in line with and support the conclusions of the Circuit Court are:

Huntington vs. *Fraternal Reserve, Ass'n of Oshkosh*, (Headnotes 3 and 4), 181 N. W. 819;

Olson vs. *Grand Lodge A. O. U. W.*, 184 N. W. 7;

Darden vs. *North American Benefit Ass'n*, 197 S. E. 413;

Sovereign Camp, Woodmen of The World vs. *Jackson*, 264 S. W. 289; and

Sovereign Camp, Woodmen of The World vs. *Peaugh*, 234 S. W. 161.

Regardless of the angle from which this case is viewed, one inevitably returns to the question: what would have happened if Clark had complied with the Constitution and By-Laws of the Order and had notified the Manager of the Claim Department of the Order in writing that he had changed his occupation from that of a Gate Keeper to that of an Internal Revenue Collector suppressing illicit distilling? Upon receiving such notice the Order would have done one of two things:

(1) Cancelled Clark's insurance certificate as it had a right to do, or

(2) Written Clark that as a result of becoming an Internal Revenue Collector suppressing illicit distilling he had an "X" rating, paying only 25% of the maximum benefits provided.

It seems absurd to us to contend that the beneficiary of one not notifying the Order of a change in occupation should be entitled to more and greater rights than the beneficiary of one who had given notice of a change in occupation in compliance with the Constitution.

Since the Circuit Court ruled that the facts found by the trial Judge, sitting without a jury, were amply supported by the evidence; and since the only issue presented by the petition for certiorari is whether the lower Courts correctly construed and applied the unambiguous language of the certificate of insurance and the Constitution and By-Laws of respondent, which were a part of said certificate, it is respectfully submitted that no question of gravity and importance is involved, and certiorari should be denied.

Respectfully submitted,

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